

1  
2  
3  
4  
5  
6  
7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 JOHN L. ERVIN, an individual,  
10  
11 Plaintiff,  
12 vs.  
13 COUNTY OF SAN DIEGO, and  
14 DOES 1-10, inclusive,  
Defendants.

CASE NO. 14cv1142 WQH  
(BGS)

ORDER

HAYES, Judge:

15 The matters before the Court are Plaintiff's Motion to File First Amended  
16 Complaint (ECF No. 33), and Plaintiff's Motion for Permanent Injunction (ECF No. 31-  
17 3).

18 **BACKGROUND**

19 On May 6, 2014, Plaintiff John L. Ervin, proceeding pro se, initiated this action  
20 by filing a Complaint, alleging that Defendant County of San Diego violated 42 U.S.C.  
21 section 1983 and seeking damages and injunctive relief. (ECF No. 1).

22 On May 28, 2014, Defendant filed a Motion to Stay the Action, or in the  
23 alternative, Dismiss Plaintiff's Complaint. (ECF No. 4). On July 21, 2014, the Court  
24 issued an Order staying the action "pending final resolution of the related action  
25 pending in San Diego County Superior Court." (ECF No. 9 at 2). The July 21, 2014  
26 Order stated that "[b]ased upon the agreement of the parties and the Court's review of  
27 the filings in this action, the Court finds that *Younger* abstention is appropriate due to  
28 the pending state-court action captioned, *Ervin v. San Diego County*, San Diego County

1 Superior Court case number 37-2014-00000207-CU-WM-CTL” and stayed the action  
2 “pending final resolution of the related action pending in San Diego County Superior  
3 Court.” (ECF No. 9 at 2).

4 On January 27, 2015, Plaintiff filed a document titled “Plaintiff’s Notice of State  
5 Proceedings Ended.” (ECF No. 27). On February 3, 2015, the Court issued an Order  
6 construing Plaintiff’s Notice of State Proceedings Ended as a Motion to Reopen the  
7 case and a Motion for Leave to Amend. (ECF No. 28 at 2). On February 13, 2015, the  
8 Court issued an Order granting Plaintiff’s Motion to Reopen and Denying Plaintiff’s  
9 Motion for Leave to amend because Plaintiff’s Motion for Leave to Amend was not  
10 “accompanied by a copy of the proposed amended pleading, or a version of the  
11 proposed amended pleading that shows how the proposed amended pleading differs  
12 from the operative pleading” as required by Local Rule 15.1(b). (ECF No. 30 at 3).  
13 The Order further stated that “Plaintiff may file a Motion for Leave to Amend which  
14 complies with Local Rule 15.1 within thirty (30) days of the date this Order is issued  
15 or the Court will proceed with Plaintiff’s Complaint (ECF No. 1) as the operative  
16 pleading.” (ECF No. 30 at 4).

17 On February 17, 2015, Plaintiff filed “Plaintiff’s Ex Parte Application for an  
18 Order Preventing His Listing on CACI.” (ECF No. 31).

19 On February 20, 2015, Plaintiff filed the Motion to File First Amended  
20 Complaint. (ECF No. 33). On March 9, 2015, Defendant County of San Diego filed  
21 a response. (ECF No. 35). On the same day, Plaintiff filed a reply. (ECF No. 36).

22 On March 3, 2015, the Court issued an Order on “Plaintiff’s Ex Parte Application  
23 for an Order Preventing His Listing on CACI” (ECF No. 31) stating that:

24 IT IS HEREBY ORDERED that Plaintiff’s request for “[a]  
25 temporary restraining order which compels [D]efendant County to request  
26 from California’s Department of Justice the removal of [P]laintiff’s name  
from the Child Abuse Central Index” is DENIED. (ECF No. 31-1).

27 IT IS FURTHER ORDERED that Plaintiff’s request for “[a]  
28 temporary restraining order which enjoins the County from submitting  
[P]laintiff’s name to the CACI pending further orders of the Court” is  
DENIED. (ECF No. 31-2).

1 IT IS FURTHER ORDERED that the motion for permanent  
 2 injunction (ECF No. 31-3) remains pending. Defendants shall file any  
 3 response to Plaintiff's motion for permanent injunction by March 16,  
 4 2015. Plaintiffs shall file any reply by March 23, 2015.

5 (ECF No. 34). On March 16, 2015, Defendant filed an opposition to Plaintiff's motion  
 6 for preliminary injunction. (ECF No. 37). On March 23, 2015, Plaintiff filed a reply.  
 7 (ECF No. 38).

### 8 **MOTION FOR LEAVE TO AMEND (ECF No. 33)**

#### 9 **I. Contentions of Parties**

10 Plaintiff contends that the motion for leave to amend the complaint was not made  
 11 in bad faith. Plaintiff contends that the matter was stayed pursuant to Defendant's  
 12 motion and Plaintiff could not bring a motion to amend. Plaintiff contends that he  
 13 discovered new acts by Defendant and its employees during the stay. Plaintiff contends  
 14 that additional claims asserted in the First Amended Complaint did not ripen until  
 15 plaintiff prevailed on the petition during the stay. Plaintiff further contends that "the  
 16 facts which evidence the need for declaratory relief declaring two statutes under  
 17 California's Penal Code unconstitutional were likewise not available until the County,  
 18 in their actions, made clear that options for removal of an improperly listed individual  
 19 on California's Child Abuse Central Index are so easily subject to manipulation from  
 20 the County as to be, de facto unavailable." (ECF No. 33 at 3).

21 Defendant contends that Plaintiff's proposed amendments to the first cause of  
 22 action are futile and made in bad faith. Defendant contends that the amendments adding  
 23 Robert Lough, grievance officer for the County of San Diego, and Debra  
 24 Zanders-Willis, head of the San Diego Department of Child Welfare Services, are futile  
 25 "because they fail to state viable claims against either Mr. Lough or Ms. Zanders-Willis,  
 26 and would thus be subject to dismissal." (ECF No. 35 at 4). Defendant contends that  
 27 "Lough cannot be held individually liable because his alleged conduct is cloaked in  
 28 absolute quasi-judicial immunity." *Id.* Defendant contends that Plaintiff has failed to  
 allege sufficient facts to show that Ms. Zanders-Willis' individual actions violated his  
 civil rights, or alternatively, that she had knowledge of and consciously acquiesced in

1 the unconstitutional conduct of her subordinates. Defendant contends that Plaintiff has  
 2 failed to adequately allege that either Mr. Lough or Ms. Zanders-Willis acted in a  
 3 manner that violated his constitutional rights and Plaintiff fails to establish a causal link  
 4 between the County's alleged unlawful policies and Mr. Lough's and Ms.  
 5 Zanders-Willis' complained-of behaviors. Defendant further contends that the  
 6 amendments adding Brenda Daly to the action are futile and made in bad faith.  
 7 Defendant contends that the cause of action against Daly is time-barred. Defendant  
 8 contends that the wording of the first amended complaint also shows that Plaintiff seeks  
 9 to add Daly to this action for the wrongful purpose of harassing her.

10 Defendant contends that the first amended complaint's second cause of action is  
 11 futile because Plaintiff cannot retroactively request damages in state writ proceedings  
 12 that have concluded.

13 Finally, Defendant contends that the first amended complaint's fourth cause of  
 14 action is futile because the relief requested is legally prohibited.

## 15 **II. Discussion**

16 Federal Rule of Civil Procedure 15 states: "A party may amend its pleading once  
 17 as a matter of course..." Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may  
 18 amend its pleading only with the opposing party's consent or the courts leave." Fed.  
 19 R. Civ. P. 15(a)(2). Federal Rule of Civil Procedure 15 mandates that leave to amend  
 20 "be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be  
 21 applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
 22 1048, 1051 (9th Cir. 2003) (quotation omitted). In determining whether to allow an  
 23 amendment, a court considers whether there is "undue delay," "bad faith," "undue  
 24 prejudice to the opposing party," or "futility of amendment." *Foman v. Davis*, 371 U.S.  
 25 178, 182 (1962). "Not all of the [*Foman*] factors merit equal weight.... [I]t is the  
 26 consideration of prejudice to the opposing party that carries the greatest weight."  
 27 *Eminence Capital*, 316 F.3d at 1052 (citation omitted). "The party opposing  
 28 amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*,

1 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing of any of  
 2 the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of  
 3 granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

4 After review of the Motion for Leave to File First Amended Complaint and the  
 5 filings of the parties, the Court concludes that Defendant has not made a sufficiently  
 6 strong showing of the *Foman* factors to overcome the presumption under Rule 15(a) in  
 7 favor of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052. The Court  
 8 will defer consideration of any challenge to the merits of the proposed first amended  
 9 complaint until after the amended pleading is filed. *See Netbula v. Distinct Corp.*, 212  
 10 F.R.D. 534, 539 (N.D. Cal. 2003) (“Ordinarily, courts will defer consideration of  
 11 challenges to the merits of a proposed amended pleading until after leave to amend is  
 12 granted and the amended pleading is filed.”). The Motion for Leave to File First  
 13 Amended Complaint is granted.

#### 14 **MOTION FOR PERMANENT INJUNCTION (ECF No. 31-3)**

15 “[A] preliminary injunction is an extraordinary and drastic remedy, one that  
 16 should not be granted unless the movant, *by a clear showing*, carries the burden of  
 17 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted)  
 18 (emphasis in original). To obtain preliminary injunctive relief, a movant must show  
 19 “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in  
 20 the absence of preliminary relief, that the balance of equities tips in his favor, and that  
 21 an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555  
 22 U.S. 7, 20 (2008); *see also Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d  
 23 1046, 1052 (9th Cir. 2009).


24 Plaintiff’s motion for preliminary injunction and Defendant’s opposition are  
 25 based on the allegations of Plaintiff’s Complaint. The Court has granted Plaintiff’s  
 26 Motion for Leave to File First Amended Complaint and the Complaint is no longer the  
 27 operative pleading. Plaintiff’s motion for preliminary injunction is denied without  
 28 prejudice to refile upon the filing of a first amended complaint.

**CONCLUSION**

IT IS HEREBY ORDERED that Motion for Leave to File First Amended Complaint is GRANTED. (ECF No. 33). Plaintiffs shall file a first amended complaint within twenty (20) days of the date this order is filed.

IT IS FURTHER ORDERED that Plaintiff's Motion for Permanent Injunction (ECF No. 31-3) is DENIED without prejudice.

DATED: March 26, 2015

  
**WILLIAM Q. HAYES**  
United States District Judge